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9 Attorneys for Plaintiffs

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN JOSE DIVISION**

13 MONTEREY BAY MILITARY HOUSING,
14 LLC, CLARK PINNACLE MONTEREY BAY
15 LLC, CLARK MONTEREY PRESIDIO LLC,
16 CALIFORNIA MILITARY COMMUNITIES
17 LLC, CLARK PINNACLE CALIFORNIA
MILITARY COMMUNITIES LLC and CLARK
IRWIN, LLC,

18 Plaintiffs,
19 vs.
20 PINNACLE MONTEREY LLC, PINNACLE
21 IRWIN LLC, AMERICAN MANAGEMENT
22 SERVICES CALIFORNIA INC., AMERICAN
23 MANAGEMENT SERVICES LLC D/B/A
PINNACLE, GOODMAN REAL ESTATE,
INC., GOODMAN FINANCIAL SERVICES,
INC., STANLEY HARRELSON and JOHN
GOODMAN,

24 Defendants.

25 AND RELATED CROSS-COMPLAINT:

26 PINNACLE IRWIN, LLC and PINNACLE
27 MONTEREY, LLC,

28 Plaintiffs,

Case No. 5:14-CV-03953 BLF

**PLAINTIFFS' EMERGENCY MOTION
TO ENFORCE BINDING TERM SHEET**

COURTROOM: 3, Fifth Floor

JUDGE: Hon. Beth L. Freeman

1
2 vs.
3

4 CLARK REALTY CAPITAL, L.L.C., CLARK
5 PINNACLE MONTEREY BAY LLC, CLARK
6 PINNACLE CALIFORNIA MILITARY
7 COMMUNITIES LLC, and DOES 1-25,
8 INCLUSIVE,

9 Defendants.
10

11 AMERICAN MANAGEMENT SERVICES
12 CALIFORNIA INC. AND AMERICAN
13 MANAGEMENT SERVICES LLC (D/B/A
14 PINNACLE),

15 Counterclaimants,
16

17 v.
18

19 MONTEREY BAY MILITARY HOUSING LLC
20 AND CALIFORNIA MILITARY
21 COMMUNITIES LLC

22 Counterdefendants.
23

1 On the eve of trial, the parties resolved this and the related Georgia lawsuit, through
 2 execution of a Binding Term Sheet. The Binding Term Sheet required Defendants to make two cash
 3 payments: the first in 30 days in the amount of \$45 million and the second in 6 months in the
 4 amount of \$39 million. (Ex. 1, Binding Term Sheet ¶ 1) Given the lengthy period of time
 5 Defendants were allowed to make these payments, and in light of a history of dissipation of assets,
 6 Plaintiffs expressly required Defendants to provide “to the reasonable satisfaction of Clark and the
 7 Project Owners full collateral and personally binding, joint and several guarantees of the above
 8 payments...” within 14 days. (Id. at ¶ 2) The parties further agreed to “negotiate subsequent
 9 agreements to more fully document this agreement.” (Id. at ¶ 8) At the very outset, Defendants
 10 have breached their initial obligations under the Binding Term Sheet, by refusing to provide true
 11 guarantees and full collateral -- much less to the reasonable satisfaction of Clark and the Owners.
 12 Indeed, Defendants have refused to answer basic questions about the pledged collateral, including
 13 about the value of the pledged assets. They have further provided purported “security” documents
 14 that are wholly deficient under Washington law (where the assets are located).

15 This Court agreed to retain jurisdiction to enforce the terms of the Binding Term Sheet,
 16 including “any subsequently executed agreements related to this Binding Term sheet.” (Id. at ¶ 9)
 17 Plaintiffs thus seek an emergency order requiring Defendants to immediately comply with
 18 Paragraphs 2 and 8, by executing satisfactory personally binding guarantees and by pledging full and
 19 acceptable collateral pursuant to pledge and security agreements that adequately protect Plaintiffs
 20 under applicable law. At this point, it appears that when Defendants executed the Binding Term
 21 Sheet that allowed them to avoid trial on the merits, they had no intention of abiding by its terms.
 22 Because Defendants’ breach of the Binding Term Sheet is so blatant, Defendants must be calculating
 23 the Court’s full calendar prevents a prompt hearing on this motion.

24 **A. Legal Standard.**

25 As the Court agreed and the law provides, courts routinely recognize that a district court
 26 maintains the inherent authority to enforce a settlement ending litigation before the court. *TNT*
 27 *Mktg., Inc. v. Agresti*, 796 F.2d 276, 278 (9th Cir. 1986); *Armstrong v. City & Cnty. of San*
 28 *Francisco*, No. C 01-2611 VRW MEJ, 2004 WL 2713068, at *1 (N.D. Cal. June 15, 2004) (“Courts

1 have inherent power to enforce settlement agreements between the parties in pending cases.”); *Nash*
 2 v. *UCSF Med. Ctr.*, No. 11-CV-4473 JSC, 2013 WL 4487503, at *1 (N.D. Cal. Aug. 19, 2013) (“A
 3 federal court has the equitable power to summarily enforce a settlement reached by the parties in a
 4 case pending before it.”).

5 A settlement agreement is governed by ordinary principles of contract law, and therefore the
 6 court may order specific performance of the agreement by the breaching party. *TNT Mktg., Inc. v.*
 7 *Agresti*, 796 F.2d at 278 (citing *Vill. of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982) (“The
 8 enforceability of settlement agreements is governed by familiar principles of contract law. . . . Upon
 9 breach by one party, the other party may obtain damages or specific performance as
 10 appropriate.”). Here, the Defendants have flouted the clear terms of the Binding Term Sheet and an
 11 order requiring specific performance of the term sheet is therefore appropriate. *Ashker v. Sayre*, No.
 12 C 05-03759 CW, 2010 WL 476634, at *5 (N.D. Cal. Feb. 4, 2010) (entering order requiring specific
 13 performance of settlement agreement after party’s breach).

14 **B. Defendants Have Breached the Binding Term Sheet.**

15 Within days of the settlement, Plaintiffs sought cooperation in obtaining personally binding
 16 joint and several guarantees and full collateral as required by the Binding Term Sheet, providing a
 17 form of guarantee and asking for a list of collateral so they could determine its sufficiency in
 18 advance of the August 20 deadline to provide such documents to the reasonable satisfaction of
 19 Plaintiffs and Clark. Ex. 2, 8/12/15 D. Welch Email to T. Dutton; Ex. 3, 8/17/15 D. Welch Email to
 20 T. Dutton. Defendants ignored these communications, and on August 18 returned a highly truncated
 21 draft guarantee that deleted important provisions. Ex. 4, 8/18/15 T. Dutton Email to D. Welch.
 22 Defendants further stated they intended to openly breach Paragraph 2 of the Binding Term Sheet by
 23 refusing to provide collateral for the first payment of \$45 million. *Id.* (“Defendants do not believe
 24 that it is necessary to collateralize this \$45 million payment.”). Equally troubling, Defendants
 25 indicated they would provide three items as collateral for the second payment of \$39 million: (1) 10
 26 million in cash; (2) the PPMS note (which based on discovery relating to the fraudulent transfer had
 27 an original face value of \$6 million, subject to significant offsets for fraudulent transfer claims that

28

1 had already been taken in an unknown amount); and (3) Mr. Goodman's personal residence.¹ Ex.
 2 4, 8/18/15 T. Dutton Email to D. Welch. Defendants provided no documentation to support the
 3 source or value of this claimed collateral. *Id.*

4 Plaintiffs immediately demanded full collateral for the entire \$84 million settlement payment
 5 as required, expressed their significant concerns with the collateral that Defendants had proposed
 6 pledging for the \$39 million second payment, and asked a series of questions regarding the proposed
 7 collateral:

- 8 • Regarding the PPMS note, Plaintiffs sought information about the current amount of the note,
 all payments to date and all agreements regarding the timing of future payments and/or set offs
 for events including fraudulent transfer claims.
- 9 • With respect to the significant amount of collateral that appeared to be based on Mr. Goodman's
 residence, Plaintiffs asked for an appraisal of the property (particularly in light of the fact that a
 residence of this purported value did not appear on the individual financial statements for Mr.
 Goodman produced in the litigation), details regarding any other mortgages or liens on the
 property, and information regarding whether any other individuals or entities jointly own any
 portion of the property. Plaintiffs also noted that if Clark and the Owners determined that the
 personal residence is, in fact, sufficient collateral for some amount of the required payment, they
 would require Mr. Goodman to execute an agreement allowing Plaintiffs to immediately
 foreclose on the property in the event of non-payment.

10 Plaintiffs also provided revisions to Defendants' form of guarantee, to include several key
 11 provisions (including, for example, a provision that would prohibit the guarantor from transferring
 12 assets pledged as collateral until the final settlement payment had been made in full). Ex. 5, 8/19/15
 13 D. Welch Email to T. Dutton. Defendants refused to consider further the terms of the guarantee or
 14 to provide any of the information Plaintiffs had requested to enable them to determine the
 15 sufficiency of the collateral. Instead, at 4:04 pm on the August 20 deadline, Defendants provided
 16 executed versions of their guarantees (in a form that had been rejected by Clark and the Owners) and
 17 executed agreements purporting to pledge collateral that had never been provided to Plaintiffs for
 18 review. Ex. 6, 8/20/15 T. Dutton Email to D. Welch. This was in blatant breach of Defendants'
 19 obligations under Paragraphs 2 and 8 of the Binding Term Sheet and, as discussed below, the
 20 guarantees and pledges of collateral are wholly unacceptable.

21 ¹ As Plaintiffs noted in communications with Defendants, individual financial statements produced for Mr. Goodman
 22 in the litigation made no reference to a personal residence, let alone one valued at upwards of \$20 million as would
 23 have been required to collateralize the full \$39 million as required. Ex. 5, 8/19/15 D. Welch Email to T. Dutton.

1 **C. Defendants' Guarantees and Collateral Do Not Provide Reasonable Protection**
 2 **To Plaintiffs And Have Been Rejected By Owners and Clark.**

3 Contrary to the terms of the Binding Term Sheet, which required the parties to "negotiate"
 4 subsequent agreements in good faith, Defendants executed guarantees that deleted certain key
 5 representations required by Owners and Clark, including representations that Defendants intended to
 6 comply with the Term Sheet and would not transfer the pledged collateral. Plaintiffs responded
 7 that the guarantees as executed were not to their reasonable satisfaction and asked for an explanation
 8 for why these critical provisions had been deleted. Ex. 7, 8/20/15 D. Welch Email to T. Dutton.
 9 Defendants have ignored the request for an explanation.

10 Further, again without giving Plaintiffs an opportunity to review the collateral or pledging
 11 agreements, Defendants unilaterally executed purported security agreements to pledge in total (a)
 12 \$40 million in cash; (b) two notes (one provided by PPMS and one by a Hunt entity from a prior sale
 13 of military project rights termed the BAF note) and Goodman's stock in GRE, which is again not
 14 valued; and (c) real estate consisting of a commercial warehouse and Mr. Goodman's residence. Ex.
 15 6, 8/20/15 T. Dutton Email to D. Welch. Defendants failed to provide any documentation or
 16 representation regarding the fair market value of the pledged collateral. A detailed review of the
 17 documents and collateral provided by Defendants reveals that they are deficient in both value and as
 18 a genuine pledge of collateral that can be drawn upon in the event of non-payment. Though
 19 Defendants failed to provide support for the value of collateral, Plaintiffs' investigation has revealed
 20 that Defendants are potentially misdirecting once again. Based on a review of public records, it
 21 appears that the pledged real estate is worth no more than \$4 million. Y. French Decl. ¶ 11. Yet this
 22 real estate, along with the PPMS Note (face value of \$6 million subject to offsets and current value
 23 uncertain), GRE stock (value unknown), and \$10 million cash is the only collateral offered to secure
 24 the \$39 million payment.

25 **(1) The "Pledge" of Cash Collateral Is Insufficient Under Washington Law**

26 Defendants contend that they are pledging \$40 million of the \$84 million in cash. However,
 27 when Plaintiffs demanded that such cash be either paid immediately or placed into an escrow
 28 account to protect Plaintiffs (Ex. 5, 8/19/15 D. Welch Email to T. Dutton), they refused to do so. As

1 Defendants and their counsel surely know, under Washington law (where Defendants purport to be
 2 holding the cash), a security interest in cash collateral is not perfected unless the funds are placed in
 3 the secured party's "control." *See* Rev. Code of Wash. § 62A.9A-312(b)(1) ("A security interest in a
 4 deposit account may be perfected only by control"). Absent such control, any purported "pledge" of
 5 cash collateral does not actually provide a perfected security interest. *Id.* Thus, Defendants'
 6 purported "pledge" of cash collateral is wholly insufficient, as Plaintiffs have no ability to prevent
 7 the dissipation of the cash collateral under Washington law.

8

9 **(2) The Pledge of Unvalued Notes and Securities Are Insufficient**

10 Defendants purport to pledge two Hunt-related notes (PPMS and BAF) without providing
 11 any documentation regarding the current value of the notes, payments made on the notes to date, and
 12 any provisions or off-sets related to their value. Plaintiffs also purportedly pledge Mr. Goodman's
 13 stock in GRE, again providing no documentation or even representation regarding its value.
 14 Defendants have also refused to provide basic documentation demonstrating that they own the
 15 pledged collateral, and have omitted common and necessary representations required to protect
 16 Plaintiffs. For example, the pledge of GRE stock omits standard restrictions on voting the shares in
 17 a manner adverse to the secured parties, language to vest the voting rights and rights to receive all
 18 payments and dividends solely in the secured parties, and a pledge of any dividends or distributions
 19 received by Defendants in contravention of the pledge agreement. Without such provisions, there is
 20 nothing stopping Defendants from dissipating all of the corporate assets and rendering the pledged
 21 security worthless.

22 Moreover, proper UCC-1 financing statements must be filed for pledged notes and stock.
 23 *See* Rev. Code of Wash. § 62A.9A-312. Absent perfected security interests, Plaintiffs "security" is
 24 at constant risk of being subordinated to others, if they are not already, and thus becoming worthless
 25 as collateral. *Id.* Critically, in the event any of the parties declare bankruptcy, the bankruptcy trustee
 26 would take an interest in the estate that is superior to all unperfected interests. 11 U.S.C. §544. No
 27 reasonable creditor would ever accept such illusory "security."

(3) The Deeds of Trust for Real Property Are Insufficient

Likewise, Defendants' unilaterally executed Deeds of Trust for a warehouse owned by GRE and Mr. Goodman's personal reference are deficient in a number of key respects. First, in order to perfect an interest in real property, the deeds of trust must be recorded, which Defendants have failed to do. The Deeds of Trust are also missing important provisions. One of the pledged properties is a commercial warehouse, but the Deed of Trust contains no environmental indemnity, rendering the purported "collateral" a potential liability. And, because the Deeds of Trust only purport to secure the Guaranty, and not the actual Binding Term Sheet, Washington Real Estate counsel has advised that Plaintiffs may be unable to secure a deficiency judgment in the event that the collateral is insufficient to cover the \$84 million settlement obligations.²

D. Plaintiffs Seek Immediate Compliance With the Binding Term Sheet.

Plaintiffs require and respectfully request urgent relief. Every day that passes without receiving any adequate, perfected security interest in full collateral is another day that risks the dissipation or conveyance of Defendants' assets. Plaintiffs ask the Court to grant Plaintiffs' Emergency Motion and Order Defendants to:

- 1) Sign the form of guarantee approved by Clark and the Project Owners attached as Exhibit 8;
- 2) Provide documentation and representations that reasonably support the value of Defendants' claimed collateral, in the amount of \$84 million;
- 3) Provide sufficient documentation identifying all parties that have any interest in the pledged collateral whatsoever, including a title commitment and an enforceability opinion for all pledged real estate; and

² A guarantor granting a deed of trust to secure its guaranty of a commercial debt shall be subject to a deficiency judgment following a trustee's sale under that deed of trust only for (A) any decrease in the fair value of the property caused by waste to the property committed by the borrower or grantor, respectively, after the deed of trust is granted, and (B) the wrongful retention of any rents, insurance proceeds, or condemnation awards by the borrower or grantor, respectively, that are otherwise owed to the beneficiary. *See* RCW 61.24.100(6).

4) Execute security agreements and deeds of trust that provide Plaintiffs a perfected security interest in the collateral, in substantially the same form as those compiled as Exhibit 9.

To the extent that Defendants refuse or fail to provide satisfactory documentation of the value and/or satisfactory, perfected security interests in the collateral, Plaintiffs further request an opportunity to take targeted discovery of the guarantors regarding the value and security interest provided by the collateral.

Conclusion

For the foregoing reasons Plaintiffs respectfully ask that their Emergency Motion to Enforce Binding Term Sheet be GRANTED.

1
2 DATED: August 24, 2015

Respectfully submitted,

3 /s/ Marc H. Cohen

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18 Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on August 24, 2015, a copy of the foregoing document is being
3 electronically filed with the Clerk of the United States District Court of the Northern District of
4 California by using the CM/ECF system, which will send notice of such filing to all counsel of
5 record.

6
7 DATED: August 24, 2015

KIRKLAND & ELLIS LLP

8 Respectfully submitted,

9 /s/ Marc H. Cohen

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